MEMORANDUM OF LAW

DATE: June 8, 1993

TO: James A. Wageman, Senior Civil Engineer
Clean Water Program

FROM: City Attorney

SUBJECT: North Metro Interceptor Project --
Easement Through U.S. Navy Property

Back in January, 1993, you identified a potential problem to us concerning possible site contamination (caused by an old landfill) at the proposed easement through the Naval Training Center for the North Metro Interceptor. Essentially, the Navy had adopted a tentative position based on a presumption that the proposed tunnel easement alignment is in fact contaminated, and that the Navy would thus be precluded from granting the easement due to provisions in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") ┌specifically, 42 U.S.C. Section 9620(h)(3)(B)σ.

Prior to answering the legal question regarding CERCLA, we awaited more information as to the accuracy of an important factual predicate for the question; i.e., whether the proposed easement is actually contaminated. You have recently verbally informed us that preliminary testing discloses no contamination at the depth for which the pipeline tunnel is proposed. If it can be demonstrated that the proposed alignment is not contaminated, and if the tunneling project will not require disturbance of or access through property which is contaminated, then no CERCLA problem exists.

The section of CERCLA in question ┌42 U.S.C. 9620(h)(3)(B)σ applies only in cases where:

> ┌Aσny real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain --

. . . .

(B) a covenant warranting that --

(i) all remedial action necessary to protect human health and the environment . . . has been taken before the date of such transfer . . . ┌Emphasis added.σ

Thus, if it is known that the property in question (the easement) is not contaminated, then 42 U.S.C. Section 9620(h)(3)(B) does not apply.

Moreover, even if we assume the matter is not resolved by the lack of actual contamination in the subject property, there is another strong argument for the inapplicability of the cited CERCLA section. An easement, as long established by common law, is an interest in the land of another, which entitles the owner of the easement to a limited use of the other's land. Restatement Property Section 450; Eastman v. Piper, 68 Cal. App. 554, 560 (1924); Moylan v. Dykes, 181 Cal. App. 3d 561, 568 (1986). An easement is an interest in the land of another; hence, though it is an interest in land, it is not an estate in land. Darr v. Lone Star Industries, 94 Cal. App. 3d 895, 901 (1979).

With these principles in mind, we believe that the granting of a tunnel sewer easement would not amount to a "transfer" of real property in the sense contemplated by 42 U.S.C. Section 9620(h)(3)(B). The plain intent of the statute is to prohibit U.S. government agencies from relinquishing ownership of contaminated property without first cleaning it up; or at least not without a covenant to bear costs of any future cleanup. Since the Navy would not be transferring an estate in the land, but would merely be granting the City a use interest in the Navy's land, the CERCLA section would not apply.

Hopefully this resolves the question concerning CERCLA. If you believe the matter still requires attention, keep us advised.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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